STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA POOLE,

Plaintiff-Appellant,

v

THE HAYMAN COMPANY,

Defendant-Appellee.

UNPUBLISHED
May 24, 2007

No. 272833
Oakland Circuit Court
LC No. 2005-070996-NO

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

PER CURIAM.

Plaintiff Patricia Poole appeals as of right an order granting defendant Hayman Company summary disposition. We affirm.

I. Basic Facts And Procedural History

Poole, her husband, and their two children were walking to the Arts, Beats, and Eats Festival in Pontiac on August 31, 2003. Poole and her family parked on the south side of Judson Street, which is about two blocks from the Festival, and then walked on a sidewalk on Judson westbound toward Woodward. They crossed to the north side of Judson, where there was no sidewalk, and cut across located at 16 West Judson, in a northwesterly direction toward the Festival.

Poole fell in a hole on the grassy area. Poole admitted that she knew the area was not a designated walkway, that she did not have permission to walk on the premises, and that the grass was not worn in the area where she was walking. However, she stated that there were "tons of people" walking in the grassy area where she fell. Poole contends that there were cut lines in the grass indicating that the grass was recently mowed. There were no barricades or signs on the premises indicating that it was impermissible for pedestrians to walk in the area.

Poole was walking and talking with her daughter and was looking at her husband when she fell. She said she did not see the hole before she fell, but she could see it after she fell, "because she was in it." She felt pain in her lower back when her husband picked her up. They continued to walk north on Woodward to the Festival. Poole estimated that she stood and waited for 40 minutes while her family "went and did their little bits of things," and then they left the Festival. She said that on the way back to their car she could see the hole and could tell it had been stepped in. Poole stated that the hole measured four inches deep and eight inches in

diameter. Poole's expert stated that the hole had existed for some time, given that there was no dirt around it and there was grass growing in it. Poole contends that she suffered injuries requiring surgery because of her fall. She took photographs of the grassy area one month after the accident and stated that the pictures were representative of the area on the day that she fell.

Poole filed suit against Hayman under a premises liability theory. The trial court granted summary disposition in Hayman's favor under MCR 2.116(C)(10), holding that Poole was a trespasser to whom no duty was owed, and, even if Poole were a licensee, there was no evidence that Hayman had notice of the divot and had no reason to know of the divot.

II. Premises Liability

A. Standard Of Review

Poole argues on appeal that the trial court erred in granting Hayman's motion for summary disposition because there remained issues of fact regarding whether Hayman had a duty to refrain from injuring Poole through its active negligence, whether Hayman breached that duty, whether Hayman had notice of the hazard, and whether the hazard was open and obvious.

A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[1] A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ.[2] When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party.[3] On appeal, we review de novo a trial court's decision on a motion for summary disposition.[4] The determination of the existence of a duty presents a question of law, which is also subject to de novo review.[5]

B. Legal Standards

In a premises liability action, the plaintiff must establish the elements of a negligence claim: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages.[6] A visitor's status as an invitee, licensee, or trespasser on another's property determines what duty

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[1] *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

[2] *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

[3] MCR 2.116(G)(5); *Miller*, *supra* at 246.

[4] *Miller*, *supra* at 246.

[5] *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004); *Benejam v Detroit Tigers, Inc*, 246 Mich App 645, 648; 635 NW2d 219 (2001).

[6] *Benton v Dart Properties, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006).

a premises possessor owes the visitor.[7] Poole argues that Hayman owed her a duty of care as either a licensee or a known trespasser. Hayman claims that Poole was a trespasser.

A licensee is one who enters another's property with either express or implied permission.[8] Permission is implied if the property possessor acquiesces in the public's known, customary use of the property. Known, customary use generally involves routine or habitual use, such as the public's routine use of a maintained path over a business owner's parking lot over a ten-year period[9] or the public's long-standing use of a private sidewalk in front of the defendant's premises.[10] "A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved."[11] A property possessor owes no duty to inspect or repair the property for a licensee.[12] Furthermore, the possessor generally does not have a duty to warn licensees against open and obvious dangers.[13]

Generally, a trespasser is one who enters another's property without the owner's consent or knowledge.[14] A property possessor does not owe a duty to a trespasser except to refrain from injuring the trespasser by willful and wanton misconduct.[15] Conversely, a *known* trespasser is one who enters another's property without consent, but the property owner either knows or should know the trespasser is on the premises.[16] A property possessor owes no duty to a known trespasser except to refrain from injuring the trespasser through active negligence.[17]

C. The Hayman Company's Status

"In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land."[18] "Premises liability is conditioned on the presence of both possession and control over the land."[19]

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[7] *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).

[8] *Pippin v Atallah*, 245 Mich App 136, 142; 626 NW2d 911 (2001).

[9] *Id*. at 139-140.

[10] *Polston v SS Kresge Co*, 324 Mich 575, 578; 37 NW2d 638 (1949).

[11] *Stitt*, *supra* at 596-597.

[12] *Burnett v Bruner*, 247 Mich App 365, 373; 636 NW2d 773 (2001).

[13] *Pippin*, *supra* at 143.

[14] *Stitt*, *supra* at 596; *Pippin*, *supra* at 145.

[15] *Stitt*, *supra* at 596.

[16] *Pippin*, *supra* at 145.

[17] *Id*.

[18] *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005).

[19] *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980).

> A "possessor" is defined as:
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> "(a) a person who is in occupation of the land with intent to control it or
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> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
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> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)."[20]

"Possession" is defined as "'the right under which one may exercise control over something to the *exclusion of all others.*'"[21] "Control" is defined as "'the power to . . . manage, direct, or oversee.'"[22]

"[L]iability for an injury due to defective premises ordinarily *depends upon power to prevent the injury . . . .*"[23] "Ownership alone is not dispositive. Possession and control are certainly incidents of title ownership, but these possessory rights can be 'loaned' to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility."[24] Questions regarding whether a defendant was actually a possessor of the subject property and how much control a defendant retained over the property are questions of fact to be resolved by a fact-finder.[25]

During oral arguments on this appeal, Hayman brought it to this Court's attention for the first time that it is not the owner of the land on which Poole fell; rather, Hayman is the property manager. Hayman clarified, for the first time, that Ottawa Towers is the property owner. Therefore, Hayman argued that, even assuming Poole had implied consent to enter the land, such consent could not have come from Hayman.

Although Poole's brief initially mentions that Hayman is the property manager of the premises, her brief also refers to "Defendant's property" and "Defendant's building." Hayman's brief fails to even hint at this issue, instead repeatedly referring to the land on which Poole fell as "Defendant's premises." Nowhere does either brief explicitly state that Hayman is not the

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[20] *Id*., quoting 2 Restatement Torts, 2d, § 328 E, p 170.

[21] *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 703; 644 NW2d 779 (2002), quoting Black's Law Dictionary (7th ed) (emphasis in *Derbabian*).

[22] *Id.* at 703-704, quoting Black's Law Dictionary (7th ed).

[23] *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 662; 575 NW2d 745 (1998), quoting *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942) (emphasis in *Kubczak*).

[24] *Merritt*, *supra* at 552-553.

[25] See *Kubczak*, *supra* at 667.

property owner. Our review of the lower court record reveals that, in its motion for summary disposition, Hayman stated as follows:

> 2. On said date Plaintiff claims she slipped and fell in a "hole" on Defendant's premises. (Plaintiff has not presented any evidence that the alleged "hole" was located on premises owned by Defendant. For purposes of this Motion only however, this will not be disputed.)

Nowhere else in the lower court record, including its answer to the complaint, its affirmative defenses, or the hearing on summary disposition, did Hayman ever specifically dispute that it was the premises owner. Indeed, there is *nothing* in the record that either substantiates or refutes that Hayman was the premises owner. Thus, although Hayman's status would normally be a question of fact, the resolution of which would bear on its duty to persons on the land, in light of Hayman's failure to assert otherwise prior to oral argument, we will treat Hayman as the possessor of the land subject to premises liability. Ultimately, however, this does not affect our disposition affirming summary disposition in Hayman's favor.

D. Poole's Status

According to Poole, many people traversed the property on their way to the Festival, and the trial court took judicial notice that, during the Festival, "people cross and trespass onto other people's lands." However, the Festival-goers' once-a-year use of the property does not rise to the level of long-standing customary use, such as that in *Polston v SS Kresge Co*, or of a path that the public used routinely over a ten-year period, like that in *Pippin v Atallah*, which would give rise to a license. Nevertheless, given the number of visitors the Festival attracts, the close proximity of the property to the Festival, and the lack of public sidewalks in front of the property, it is reasonable to conclude that Hayman *should* have known that pedestrians would be cutting across the property during that period. Hayman therefore owed Poole a duty, as a known trespasser, to prevent injury to her through its active negligence. Consequently, the trial court erred by holding that Hayman did not owe any duty to Poole.

E. Active Versus Passive Negligence

Poole alleges that Hayman actively or affirmatively turned the hole into a hazard by camouflaging it through seeding, fertilizing, and cutting the grass. Active negligence refers to activities—that is, action or conduct—on the premises, as opposed to the condition of the premises itself.[26] "'[A]ctive negligence,' in the context of the duty to known trespassers, means negligent acts or conduct occurring after the trespasser is present."[27] An example of active negligence is found in *Polston* where an employee of the defendant lowered an awning in disregard of a window washer's safety.[28] The Michigan Supreme Court instructed, however, that *passive* negligence, for which the landowner owes no duty to a known trespasser, arises from

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[26] 62 Am Jur 2d Premises Liability § 195; *Pippin*, *supra* at 145.

[27] *Pippin*, *supra* at 145 n 2.

[28] *Polston*, *supra* at 577-578.

maintaining premises in a defective or dangerous condition.[29] "In general, the term 'passive negligence' denotes negligence which permits defects, obstacles, or pitfalls to exist upon the premises, in other words, negligence which causes dangers arising from the physical condition of the land itself."[30]

Here, Poole does not argue that Hayman was actively negligent by creating the hole. Rather, Poole argues that the hazard was created through Hayman's affirmative acts of encouraging the grass to grow over the hole. The only evidence Poole presented in support of her argument was that the grass appeared to be recently mowed. There is no evidence that the grass was seeded or fertilized, or even watered. The regular mowing of grass over a hole or divot, rather than filling the hole, falls into the category of permitting a defect, obstacle, or pitfall to exist upon the premises. Thus, any negligence on Hayman's behalf would be through maintaining the premises in a defective or dangerous condition, which constitutes passive negligence.

We hold that, drawing all inferences in favor of Poole, summary disposition was proper since reasonable minds would not differ in finding that Hayman was not actively negligent and therefore did not breach its duty to Poole. Although the trial court may have reached the correct result using the wrong reasoning, it will be upheld on appeal.[31]

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Jessica R. Cooper

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[29] *Id*. at 579.

[30] 62 Am Jur 2d Premises Liability § 195.

[31] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).